No. 82-1568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD LEE BROWNE, *et al.*,
Petitioners,

v.

McDONNELL DOUGLAS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS C. WALSH (Counsel of Record)
TIMOTHY R. CAPPEL
MICHAEL G. BIGGERS
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Respondent

BRYAN, CAVE, McPHEETERS & McROBERTS
Of Counsel

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

STATEMENT REQUIRED BY RULE 28.1

This brief is filed on behalf of McDonnell Douglas Corporation, which has no parent companies or subsidiary or affiliated companies (except wholly-owned subsidiaries).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

No. 82-1568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD LEE BROWNE, *et al.*,
Petitioners,

v.

McDONNELL DOUGLAS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

This wrongful death diversity action arose out of a mid-air collision of two commercial jet aircraft over Zagreb, Yugoslavia, that admittedly occurred because the Yugoslav air traffic controllers carelessly and negligently caused the two aircraft to fly into each other at an altitude of 33,000 feet, killing all passengers and crew members. The Petition to this Court represents the last episode in petitioners' search for an additional cause for the accident and an accompanying deep pocket.

Although the primary issue now sought to be raised in this Court — whether state or federal law determines the sufficiency of the evidence on a motion for directed verdict in a diversity

case — is of general academic interest, its resolution is hardly a matter of high priority, and any pronouncement by this Court in the context of this case would be of questionable utility to lower courts in other cases. Moreover, the issue is not properly reviewable on this Petition because: (a) It was not raised in the trial court; (b) there is no significant difference between state law and federal law on this issue; and (c) even accepting petitioners' strained reading of California law, the result reached by both lower courts was correct under either state or federal law, thus rendering superfluous any decision on the principal question presented.

STATEMENT OF FACTS

On September 10, 1976, a DC-9 owned and operated by a Yugoslav airline, Inex Adria Airways, took off from Split, Yugoslavia, on a flight to Cologne, Germany. It climbed steadily after takeoff to 26,000 feet and thereafter was cleared to and began its climb to its cruising altitude of 35,000 feet, under the guidance of the air traffic control system at Zagreb. At the same time, a British Airways Trident 3 was proceeding on a scheduled flight from London, England, to Istanbul, Turkey, at its assigned altitude of 33,000 feet. Its flight path was roughly perpendicular to that of the DC-9, and it was leaving a seven-mile-long white vapor trail in its wake.

It was under these circumstances that, by admission of petitioners' own witnesses, the air traffic controller made "at least one controller error, maybe two" (Tr. 271). Since both planes were flying under the direction of air traffic control, their pilots could not have made any significant deviation from the controller's directions unless they perceived that there was an emergency (Tr. 278, 342, 375). It was therefore perfectly reasonable for both pilots to rely on the air traffic controller to provide adequate separation between aircraft (Tr. 249, 284, 370, 511-12). One of petitioners' own witnesses testified that under those circumstances the crew "would expect that the aircraft that was coming directly toward them would pass either over them or under them . . ." (Tr. 373).

The Zagreb air traffic control station, particularly the higher altitude or "upper sector" portion, was seriously understaffed on the day of the collision (Tr. 243-44). The middle-sector controller admittedly erred by giving the DC-9 clearance to climb through the altitude at which the Trident was cruising (Tr. 146-47, 159). The middle-sector controller then compounded the error by deviating from standard procedure and directing the DC-9 to put its radar transponder (which enables the controller to locate the aircraft on the radar screen) on *standby* before it made contact with the upper-sector controller. This standby setting removed any identification of the DC-9 from the upper-sector controller's radar screen and thus robbed the overworked upper-sector controller of vital information as to the altitude of the DC-9 (Tr. 238, 290, 292-95).

Only when the DC-9 contacted the upper-sector controller, just seconds before the collision, was the controller informed that the DC-9 was at an altitude of 32,700 feet. He panicked:

> "That was the killer reply. That was the reply that made him panic" (Tr. 300).

The upper-sector controller, in his hysteria, abandoned the standard English language and lapsed into Serbo-Croatian, which was unintelligible to the crew of the Trident and therefore failed to inform them of the impending collision (Tr. 297). He provided information and instructions to the DC-9 in Serbo-Croatian in a defective and improper manner (Tr. 308-09). As petitioners' expert witness on air traffic control stated, "his brain must have been frozen" (Tr. 268). In particular, he told the DC-9 in Serbo-Croatian to maintain "the level you are now climbing" because there was another "aircraft in front of you . . . 335 . . ." This confusing transmission probably caused the DC-9 crew to believe either that there was no risk of a collision because the other aircraft was at an altitude of *33,500* feet rather than 33,000 feet or that there was no risk of collision as

long as the DC-9 remained in its present flight path (Tr. 373-74). The fact was, though, that the Trident was at 33,000 feet, the same altitude that the DC-9 maintained in response to the controller's direction. Seconds later, the two aircraft collided.

In the face of this uncontroverted record of controller error, petitioners conjured up, without any evidence, a hypothetical and extremely implausible version of how the collision might have occurred and asked the trial judge to permit the jury to speculate that an incredibly unlikely series of coincidences could have combined to produce this tragedy. The fulcrums of this suggested scenario are the unproven contentions (a) that the center windshield post of the DC-9, being 4.42 inches wide, was thereby defective[1] and (b) that the post prevented the pilot and the co-pilot of the DC-9 from seeing the Trident in time to take evasive action.

The problems with petitioners' thesis are manifold and include the following:

> (i) There was no evidence that the post actually inhibited the crew of the DC-9 from seeing the Trident;
>
> (ii) The Trident and its seven-mile condensation trail were readily visible to the co-pilot of the DC-9, who had the same duty as the pilot to maintain a watch for other aircraft;
>
> (iii) Although petitioners' theory of visual "obscuration" was dependent upon the assumption that the pilot sat rigidly fixed in the worst possible position (the

---

[1] Petitioners' reliance on FAA regulations to support their contention that the windshield post violated federal law (Pet. 3) is misplaced. The cited document, though published in the Code of Federal Regulations, is not a regulation prescribing regulated specifications. As the district court recognized in correcting a similar mischaracterization by petitioners at trial, this exhibit contains "not requirements, recommendations" (Tr. 762). Indeed, the Trident itself has wider windshield posts than the DC-9 (Tr. 366, 494-95), and yet both aircraft have been certified as safe by numerous countries, including the United States.

so-called "design-eye" position), there was no evidence whatsoever concerning the location of the pilot's seat and no evidence that he was even looking out the window; and

(iv) Even assuming that the pilot was sitting rigid in the position which made it least likely that he could see the Trident, the evidence was clear that he nonetheless could have seen the Trident's condensation trail with one eye for approximately 60 to 80 seconds before the collision and with both eyes for about 10 seconds before impact.

The record was barren regarding the crew's activities during the critical minutes before the crash. There was no evidence that they were looking for other aircraft or, for that matter, that they were both even in the cockpit at the relevant times.

On the issue of seat location, the evidence affirmatively showed that pilots alter the position of the seat (Tr. 526) and that a shift in seat position directly changes the effect of the post on a pilot's vision (Tr. 656-58). The district court correctly observed that the evidence showed that "[a] movement of as little as two to three inches causes *significant* changes in the visual geometry . . . ." (Pet.Apdx. E-9). Even a shift of only an inch or two from the position assumed by petitioners would result in bringing the Trident and a part of its contrail into the field of view of one eye at a different time (Tr. 658-59, 721). A shift producing a "small difference" in position could bring the Trident or the contrail into view of the right eye, even though that eye would not see the contrail from the hypothesized position until just before impact (Tr. 671-72, 708-10).

There was no evidence to show where the pilot's seat and head were actually located. As the district court observed:

"There is no evidence before the court from which a jury could find what position the seat was, in fact set or that as a matter of practice or custom in the industry, it

> was more probable that it was in the design eye position than any other or that the design eye position was a normal position in which such a seat would be kept" (Pet.Apdx. E-10).

On the issue of head movement, two witnesses indicated that pilots do frequently move their heads while scanning for other planes (Tr. 532-33, 612, 710). Petitioners' "vision expert" admittedly relied upon a study which stated that:

> "[W]hile searching the skies for other aircraft, there is a basic psychological urge for a pilot to improve his vision by head and shoulder movements. It is believed that this would be true regardless of the amount of visibility offered by the windshield" (Tr. 712).

After hearing all of petitioners' evidence, the trial court directed a verdict because the record did not warrant submitting the proximate cause issue to the jury. The court reasoned that the jury would be required to engage in speculation in order to conclude that the crew's attempts to see the Trident were defeated by the windshield post. In opposing respondent's motion for directed verdict, petitioners' counsel never argued that a state, rather than a federal, standard should control or that a different result would be required under state law.

On appeal, the Ninth Circuit affirmed in a *per curiam* opinion by Judges Choy, Sneed and Farris. The court ruled that a submissible case is not made "if the evidence merely suggests the possibility that proximate cause exists . . . or if causation is a matter of speculation" (Pet. Apdx. C-2). The Ninth Circuit rejected petitioners' suggestion, proffered for the first time on appeal, that California law required a different result by noting that (a) California favors shifting the burden to defendants in products liability cases only *after* causation is established by the plaintiff, and (b) the California doctrine invoked by petitioners applies only to safety devices that are "within the common experience of ordinary consumers" (Pet. Apdx. C-3, n.1).

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Court of Appeals Properly Applied Federal Law To Assess the Sufficiency of the Evidence, and Review of the Questions Presented by the Petition Is Not Warranted.

Although it cannot be denied that the various circuits are not uniform in their approach to the central issue raised by the Petition, the extent and effect of that divergence is largely illusory, and the issue is not of such significance as to warrant plenary consideration by this Court. The vast majority of courts, including the Ninth Circuit in this case, have applied the federal test for the reasons most persuasively set forth in the leading en banc decision of the Fifth Circuit in *Boeing Co.* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969).[2]

It is also now generally accepted by the commentators that the federal test controls the sufficiency of evidence in a diversity case.[3] Examination of opinions opting for state law reveals that

---

[2] Just last Term, this Court refused to consider a challenge to the validity of the *Boeing* doctrine in *Red Diamond Supply Co.* v. *Liquid Carbonic*, 637 F.2d 1001 (5th Cir.), *cert. denied*, 454 U.S. 827 (1981).

[3] See: Feldman, *The Difference Between the Pennsylvania and Federal Tests of Sufficiency of Circumstantial Evidence and the Choice of Law in Federal Diversity Cases*, 72 DICK.L.REV. 409, 425-29 (1968); Bagalay, *Directed Verdicts and the Right to Trial by Jury in Federal Courts*, 42 TEXAS L.REV. 1053, 1054-58 (1964); *Clark, Federal Procedural Reform and States' Rights: To a More Perfect Union*, 40 TEXAS L.REV. 211, 220-21 (1961); Note, *State Trial Procedure and the Federal Courts: Evidence, Juries, and Directed Verdicts under the Erie Doctrine*, 66 HARV.L.REV. 1516, 1523-1525 (1953); Symposium, *Federal Trials and the Erie Doctrine*, 51 NW.U.L.REV. 338, 347-51; Comment, *Substance and Procedure under the Doctrine of Erie Railroad Co.* v. *Tompkins*, 30 TEXAS L.REV. 600 (1952); Comment, *The Proper Standard for Directed Verdicts in the Federal Courts: The Influences of the Seventh Amendment and the Erie Doctrine*, 15 VILL.L.REV. 193 (1969).

in many instances (a) the choice is made without any discussion by the court or with the acquiescence of the parties, or (b) the issue, while phrased in terms of "sufficiency of the evidence," really involves the plaintiff's failure to establish one of the essential substantive elements of the state-created cause of action. Professor Moore, while noting the lack of uniformity among the circuits, nevertheless observes that "the issue is not generally troublesome because most of the state law on the subject is not divergent from the federal law and more and more states are coming into line." 5A MOORE'S FEDERAL PRACTICE ¶ 50.06, p. 50-64 (2d ed. 1982). This, of course, is one of the reasons that this Court did not reach the issue in either *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959), or *Mercer* v. *Theriot*, 377 U.S. 152 (1964). As we will demonstrate below, that same result would ensue if certiorari were granted in this case.

Furthermore, it is doubtful that a pronouncement from this Court in a strict liability context would provide any meaningful guidance for lower courts. The difficulty is not so much in stating a rule as in applying it to a virtually infinite variety of factual situations. All courts would seemingly agree that if the issue is viewed as purely procedural (*i.e.*, whether enough evidence has been offered to sustain element A, B or C of a plaintiff's cause of action), the federal sufficiency-of-the-evidence test controls. On the other hand, where the question is substantive (*i.e.*, whether under state law the plaintiff must also establish element D as a part of his cause of action), state law governs, even though the standard applied its occasionally described in loose terms as the "sufficiency of the evidence."

Hence, this Court's adoption of a federal standard in this case would provide little assistance to lower courts in their consideration of the broad spectrum of cases in light of both quantitative and qualitative notions of "sufficiency."

For reasons which have been publicly aired at some length recently, this Court can make better use of its valuable time than by devoting its energies to narrow and often esoteric questions of evidentiary adequacy which are "not generally troublesome."[4]

II. Review in this Case Is Inappropriate Because Petitioners Never Raised the Alleged Differences Between Federal and State Law in the District Court.

Although lengthy arguments were made on respondent's motion for a directed verdict before the trial judge (see Pet. Apdx. E), no contention was ever advanced by petitioners' counsel that the standard for determining the sufficiency of the evidence should be controlled by California law or that the result would be any different if state law were applied. Petitioners at no time cited to the court the *Barker* or *Dimond* cases upon which they now rely. Nor was there ever any mention of the Seventh Amendment either at trial or in the Court of Appeals.

Hence, this Court should deny certiorari here for the same reason that it refused to choose between federal and state sufficiency-of-the-evidence standards in *Dick* v. *New York Life Insurance Co., supra. Dick* reaffirmed the well-established principle that this Court will not review questions that are not presented to the lower courts. *See Singleton* v. *Wulff,* 428 U.S. 106 (1976). This salutary maxim is based on the proposition that a trial judge should not be convicted of error that was never brought to his attention.

Petitioners may argue that they did not invoke California law at the trial level because the rule on which they now rely was first officially enunciated by the California Supreme Court in

---

[4] If the Court deems the ostensible inconsistency among the circuits to require clarification, it may consider the advisability of granting certiorari and summarily affirming the Ninth Circuit's adoption of the federal standard. The abstract issue is clear-cut, was properly decided below, and does not warrant or require plenary consideration.

Campbell v. *General Motors Corp.*, 32 Cal. 3d 112, 649 P.2d 224 (1982). To be sure, the *Campbell* opinion is the one most frequently cited by petitioners (Pet. 10, 11, 12, 13, 14). But even if this supposed divergence between federal and state law (which we neither discern nor understand) first emerged in *Campbell*, petitioners' cause is not aided. The instant case was tried in June 1981, and *Campbell* was not decided until August 1982. Since petitioners' attempts to apply state law to the sufficiency-of-the-evidence issue are necessarily based on the assumption that the California rule is substantive (Pet. 9), petitioners encounter insurmountable retroactivity problems because California will not apply substantive judicial decisions retrospectively. *See Li* v. *Yellow Cab Company of California*, 13 Cal. 2d 802, 532 P. 2d 1226 (1975) (comparative negligence doctrine held inapplicable to any case in which trial began before date of Supreme Court opinion adopting the doctrine).

Accordingly, the rule of *Campbell*, even if deemed relevant in federal cases, was not applicable to a trial held fourteen months before it was announced.

III. There Is No Difference Between Federal Law and California Law as to the Standards for Directing a Verdict in this Case.

Petitioners' failure to raise their late-conceived "conflict" between federal and California law in the trial court is understandable because such a conflict is non-existent, at least in the circumstances of this case.

Although petitioners nowhere identify precisely what they regard as the relevant California test for directing a verdict, they do cite several excerpts from California opinions, out of context, for the apparent proposition that the policy behind strict liability requires that any plaintiff with a product-induced injury can get to the jury merely by invoking the strict liability doctrine. That suggestion was in fact made to the California

Supreme Court in *Barker* v. *Lull Engineering Co.*, 20 Cal. 3d 413, 573 P.2d 443 (1978), but the court stated that its rule for strict liability "eschews both extremes and attempts the balanced approach." 20 Cal. 3d at 435.

Petitioners' reading of California law as a license for jury speculation was pointedly rejected in one of the cases on which they purport to rely, *Dimond* v. *Caterpillar Tractor Co.*, 65 Cal. App. 3d 173 (1976). The court there ruled that a plaintiff can make a *prima facie* case "if he establishes that there was a defect in the manufacture or design of the product, *and that such defect was a proximate cause of the injury*." *Id.* at 177 (emphasis added). The plaintiff may prove his case on the basis of circumstantial evidence, and deductions of fact so produced are "likewise proper provided [they are] not too remote or speculative." *Id.* at 181. Although the plaintiff in *Dimond* requested the court to shift the burden of proof on the issue of causation once a showing of defect had been made, the court declined the invitation. Instead, the court left the burden upon plaintiff and permitted him to satisfy that burden through circumstantial evidence, saying that if the requested inference "has support in established facts and is a reasonable deduction or extension of that evidence, it cannot be condemned as speculative." *Id.* at 184-85. Hence, a California jury has no more license to speculate than does a federal jury.

The 1982 California Supreme Court ruling in *Campbell* v. *General Motors Corp.*, *supra*, is not applicable to this case for the reasons stated by the Ninth Circuit (in addition to being foreclosed by the California retroactivity doctrine). The state high court in *Campbell* shifted the burden of proof to the defendant to prove that the product was not defective only *after* the plaintiff had established causation.[5] Petitioners here did not

[5] Petitioners erroneously assert that there was no evidence of causation in *Campbell* (Pet. 12). The plaintiff specifically testified that when the bus lurched and then suddenly stopped, she reached for a seat bar to grab onto, but none was available. The court ruled that this was sufficient evidence of proximate cause. 32 Cal. 3d at 124.

make that threshold showing and, in fact, seek to be excused from doing so. The *Campbell* court also limited its ruling to safety devices that are "within the common experience of lay jurors." 32 Cal. 3d at 125. The windshield post on a DC-9 is scarcely in that category.[6]

In a case of this type, both federal law and California law require a plaintiff to make a *prima facie* showing of defect and causation, neither of which may be the product of speculation. Therefore, there is no choice to be made between federal and state law in the context of this case. If this case were accepted for review, the Court would ultimately be constrained to dismiss the writ as improvidently granted because any ruling on the federal-versus-state law question in this case would be tantamount to an advisory opinion.

IV. The Alleged Difference Between State and Federal Law Is Immaterial in this Case Because the Result Would Be the Same No Matter What Standard Is Applied.

Regardless of whether there is some theoretical discrepancy between the federal and California standards for evaluating the sufficiency of the evidence, the result in this case would be the same under either standard. The Court would therefore be precluded from reaching the central question purportedly presented by the petition for the same reason that the issue went unresolved in *Mercer* v. *Theriot*, 377 U.S. 152 (1964).

In order for petitioners to get to the jury on the theory that the collision was attributable to an alleged defect in the aircraft, they were required to prove the following:

1. The DC-9 pilot was seated in the cockpit.

2. The pilot was looking for the Trident.

---

[6] Petitioners' statement that windshield posts are "within the common experience of an airline pilot" (Pet. 13) misses the point.

3. The pilot was located so that the Trident was obscured from his vision by the winshield post at all times until it was too late to avoid the collision.

4. The DC-9 pilot did not move his head or otherwise look around the post.

5. The DC-9 co-pilot did not see the Trident.

6. Had either the DC-9 pilot or co-pilot seen the Trident, he would have realized that the two aircraft were on a collision course and would have taken evasive action which would have avoided the collision.

A jury should be permitted to consider petitioners' theory of causation only if there was a sufficient *prima facie* showing of *each of these six supporting facts or inferences.* As developed at trial, however, the evidence failed to supply any of the necessary links in petitioners' proposed chain of causation.

1. There was no direct evidence on the actual activities of the pilot. There was no circumstantial evidence showing that the pilot was even in the cockpit until the last few seconds before the collision, when he was on the radio.

2. There was neither direct nor circumstantial evidence which showed that the pilot was looking for the Trident. There was no evidence about the customary allocation of responsibilities among the crew of an aircraft owned and operated by Inex Adria, and there was direct evidence that pilots do not spend all of their time looking for other aircraft.

3. There was neither direct nor circumstantial evidence concerning the location of the pilot's seat *vis-a-vis* the windshield post. There was no evidence to support petitioners' proposed inference that the pilot would maintain his seat in the "design eye position." In fact, the only direct evidence from a pilot was to the contrary (Tr. 526).

4. There was neither direct nor circumstantial evidence that the pilot did not look around the post if it in fact obscured his vision. The only direct evidence was that pilots do sometimes move their heads so as to look around windshield posts and other objects (Tr. 532-33, 612, 710, 712).

5. There was neither direct nor circumstantial evidence that the DC-9 co-pilot did not see the Trident, which was in his plain sight at all times during the last three minutes of the flight. There was no evidence to show that the co-pilot would not have been looking toward the Trident because of either the particular direction from which it was coming or his use of the radio (Tr. 371-72, 513-15, 535-36).

6. Finally, there was neither direct nor circumstantial evidence that it was more probable than not that the DC-9 would necessarily have taken evasive action had the crew spotted the Trident. The testimony from airline pilots that they would take evasive action if they saw another aircraft which they *thought* was on a collision course does not render this inference more probable than not because there was no evidence that the DC-9 crew thought they were on a collision course with the Trident.

On this record, therefore, any jury which went beyond the malfeasance in the air traffic control operation would have been forced to guess or speculate between a variety of additional theories of causation.[7]

---

[7] Even though respondent was not required to put on any of its evidence, the record compiled during petitioners' case suggested that each of the following suppositions was considerably more plausible than petitioners' attenuated "windshield post" theory: (1) The DC-9 crew was careless and did not maintain proper watch for the Trident; (2) the DC-9 crew, watching for the Trident, failed to see it simply because they failed to focus their vision on it until it was too late; (3) the DC-9 crew saw the Trident and misjudged the risk of collision; (4) the DC-9 crew saw the Trident and relied upon the Trident's crew or the air traffic control system to avert any collision.

Under any conceivable standard, the trial judge properly analyzed this case and determined that only speculation would permit the jury to find that a windshield post had anything whatever to do with the crash that was admittedly caused by a known factor — air traffic control error. He viewed the evidence in the light most favorable to the petitioners (Pet. Apdx. E-7) and concluded that any finding of proximate cause would necessarily involve a reasoning process that would be inappropriate under either federal or state law.[8]

Hence, the distinction proposed by petitioners between state and federal law is immaterial in the context of this case, and the suggestion that a different result would obtain if this lawsuit were examined under state law is without foundation. Accordingly, since the evidence is insufficient under any test, no guidance could be afforded as to the main question posed by the Petition. *Mercer* v. *Theriot, supra.*

---

[8] Petitioners hyperbolically assert that uniform application of well-established rules will mean that "a midair collision case can never go to the jury" (Pet. 14). That contention is captious and fails to take into account three significant factors that differentiate this case from others: (1) The unavailability of the cockpit recorder from the DC-9, which prevented discovery of what the crew was doing in the final minutes before impact; (2) the admitted gross negligence of the air traffic controllers; and (3) the failure to adduce any evidence of custom or industry practice regarding a central issue — seat location. Contrary to petitioners' protestations, this is not a case where the cause of the collision is a mystery.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS C. WALSH
(Counsel of Record)
TIMOTHY R. CAPPEL
MICHAEL G. BIGGERS
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Respondent

BRYAN, CAVE, McPHEETERS & McROBERTS
Of Counsel

April 1983